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CASE NBR: [93101201] CSX STATUS: [DECIDED]
SHORT TITLE: [Capital Area Right To Life]
VERSUS [Downtown Frankfort, et al.] DATE DOCKETED: [012694]
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1	Jan 26 1994	D	Petition for writ of certiorari filed.
2	Mar 2 1994		DISTRIBUTED. March 18, 1994 (Page 16)
3	Mar 2 1994	X	Brief of respondents Downtown Frankfort, Inc., et al. in opposition filed.
4	Mar 23 1994		REDISTRIBUTED. April 15, 1994 (Page 2)
6	Apr 18 1994		REDISTRIBUTED. April 22, 1994 (Page 15)
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12	May 16 1994		REDISTRIBUTED. May 20, 1994 (Page 13)
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15	May 31 1994		Petition DENIED. Dissenting opinion by Justice O'Connor. (Detached opinion.)

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No. 931201

In The Supreme Court of the United States

October Term, 1993

Capital Area Right to Life, Inc.,
Petitioner,

v.

Downtown Frankfort, Inc. and John Gray,
individually and as
President of Downtown Frankfort, Inc.,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of Kentucky

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Downtown Frankfort, Inc. (DFI) sponsors and promotes festivals using traditional public forum property and featuring booths in which vendors, civic groups, and other organizations promote themselves and their activities. DFI allowed petitioner Capital Area Right to Life (CARTL) to have a booth in the 1989 "Great Pumpkin Festival." In 1990, DFI denied permission for abortion advocacy groups (pro and con) to have booths in the festival because DFI deemed their messages "inappropriate" to the "theme and purpose" of the festival. The Supreme Court of Kentucky held that this denial constituted "state action" but that DFI's policy was a content-neutral "time, place, and manner" regulation which did not violate CARTL's rights under the First and Fourteenth Amendments.

1. Is a policy which excludes speakers from a traditional public forum because their message is deemed "inappropriate" to the "theme and purpose" of a festival a content-based restriction on speech?

2. Does the selective exclusion of abortion advocacy groups (pro and con) from equal access to a public forum violate the First and Fourteenth Amendments?

3. Is a policy of excluding from a public forum those groups "deemed inappropriate to the theme and purpose" of a festival unconstitutional, on its face and as applied, under the First and Fourteenth Amendments?

PARTIES

The names of all of the parties to the proceeding in the court below appear in the caption of the case.

Petitioner is a nonprofit corporation. It has no parent company or subsidiaries. *See* Rule 29.1.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. _____

CAPITAL AREA RIGHT TO LIFE, INC.,
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Petition for Writ of Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The decision of the Supreme Court of Kentucky is reported as *Capital Area Right to Life, Inc. v. Downtown Frankfort, Inc.*, 862 S.W.2d 297 (Ky. 1993) (App. 1a). The order denying rehearing is unreported. App. 42a.

The decisions of the Court of Appeals of Kentucky (App. 28a) and the Franklin Circuit Court (App. 25a) are not reported.

JURISDICTION

The Supreme Court of Kentucky entered its decision on July 1, 1993 and its order denying rehearing on October 28, 1993. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The first amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the fourteenth amendment to the United States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

Facts [1]

Respondent Downtown Frankfort, Inc. (DFI), a nonprofit corporation which the Supreme Court of Kentucky has held to be a state actor, App. 5a-7a, exists for the purpose of promoting the revitalization of downtown Frankfort, Kentucky, as a place to live, visit, shop, and work. In pursuit of this purpose, DFI sponsors and promotes periodic festivals, including "Dog Days" in August and "The Great Pumpkin Festival" in October. These

[1] Because the trial court granted summary judgment against petitioner CARTL, petitioner states the facts in the manner most favorable to itself. The material facts, are however, undisputed.

festivals feature sales and informational booths for vendors, civic groups, and others.

DFI organized a "Great Pumpkin Festival" for Oct. 27, 1990, and solicited members of the general community, through newspaper advertisements, to participate by operating their own respective booths at the festival. The festival was to be held along St. Clair Mall (a block of city street converted to a pedestrian right of way) in downtown Frankfort.

Capital Area Right to Life, Inc. (CARTL), the Kentucky National Organization for Women (NOW), and the Kentucky Religious Coalition for Abortion Rights (RCAR), each applied for booth space at the 1990 festival. DFI denied permission to all three groups. There is no evidence that DFI rejected the application of any other entity.

CARTL previously had operated a booth at the 1989 festival. CARTL conducted its booth in a orderly and dignified fashion and distributed over 200 balloons. Nevertheless, other festival participants and festival-goers complained to DFI representatives about CARTL's presence.

When CARTL reapplied for a booth at the 1990 festival, DFI's president, respondent John Gray, verbally informed CARTL that CARTL would not be allowed to have a booth because CARTL was a "controversial" group. CARTL wrote seeking reconsideration. The board of directors of DFI, on Oct. 2, 1990, voted to deny CARTL's application and formally adopted the following policy:

> Since DFI sponsored theme festivals, events, and booths are meant to be for fun and entertainment, DFI reserves the right to deny participation to any displayer/merchandiser deemed inappropriate to that theme and purpose.

Under this same policy, DFI also denied NOW and RCAR permission to have booths at the festival.

DFI has no formal guidelines to identify what is "inappropriate" to the "theme and purpose" of the "Great Pumpkin Festival." On the contrary, the DFI policy explicitly reserves to DFI sole, unreviewable discretion to decide which booth applicants would be "appropriate" and therefore allowed to participate.

DFI did not explain why entities like churches, businesses, schools, and civic organizations would be "appropriate" to the theme or purpose of the "Great Pumpkin Festival" in a way that CARTL, NOW, and RCAR would not be.

Proceedings

Petitioner CARTL brought suit for declaratory and injunctive relief in state court, under 42 U.S.C. § 1983, against respondents DFI and Gray (DFI's president). CARTL alleged that DFI's policy denied CARTL equal access to a public forum, in violation of the First and Fourteenth Amendments. DFI countered with a motion to dismiss for lack of state action.

The Franklin Circuit Court treated DFI's motion as a motion for summary judgment, which the court granted for lack of state action. App. 25a. The Court of Appeals of Kentucky affirmed, 2-1, agreeing that there was no state action. App. 28a.

The Supreme Court of Kentucky granted discretionary review (App. 41a) and affirmed by a 5-2 vote. *Capital Area Right to Life, Inc. v. Downtown Frankfort Inc.*, 862 S.W.2d 297 (Ky. 1993) (App. 1a). The state supreme court disagreed with the rationale of the lower courts and held that DFI was a state actor subject to the Fourteenth Amendment. 862 S.W.2d at 299-300 (App. 5a-7a). Nevertheless, the state supreme court affirmed, holding that DFI's booth policy passed constitutional muster.

The state supreme court acknowledged that the festival site was a "public area" and proceeded to apply the "time, place, and manner" test for regulating speech in public fora. *Id.* at 300-01 (App. 3a-9a). The court noted that DFI had excluded not only a pro-life organization (petitioner CARTL) but also abortion advocates (NOW and RCAR); for this reason, the court ruled, the DFI policy was "content-neutral in the only sense that is important to this case." *Id.* at 301 (App. 9a-10a). According to the court, the DFI policy did not restrict "the content of the message, but only the type of message," and was thus a "reasonable limitation on 'time, place, and manner' ". *Id.* (App. 10a).

In a vigorous dissent, two justices criticized the majority for its "misinterpretation of the term 'content-neutral.' " *Id.* at 302 (App. 13a). According to the dissent, the exclusion of both pro- and anti-abortion groups could not save the policy: "If the state has the right to examine the content of speech and to deny its free exercise simply because it denies the free exercise of others, then free speech means nothing." *Id.* (App. 12a). The dissenters charged that DFI's policy imposed a "vague, standardless policy," *id.* at 305 (App. 18a), amounting to an invalid prior restraint, *id.* at 303 (App. 13a). This same policy, the dissent asserted, "could possibly exclude a booth by an environmental group, the NAACP or a church . . . ." *Id.* at 304 (App. 16a).

The state supreme court denied CARTL's petition for rehearing by a 4-3 vote. App. 42a.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Kentucky has reached the astounding conclusion that government may exclude abortion advocacy speech from a public forum, so long as the exclusion covers both sides of the abortion debate. This decision is completely irreconcilable with the applicable precedents of this Court. Accordingly, this Court should grant review.

THE DECISION OF THE SUPREME COURT OF KENTUCKY SQUARELY CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT.

The court below held that the respondent festival organizers could exclude abortion advocates (pro and con) from a public forum because of the "inappropriateness" of their message. This decision patently conflicts with the applicable decisions of this Court.

A. Content-neutrality

First, the court below seriously misunderstood and misapplied the meaning of "content-neutrality."

The Supreme Court of Kentucky ruled that respondent DFI's exclusion of abortion advocacy speech was "content-neutral in the only sense that is important to this case" because DFI excluded *both sides* of the abortion debate. This holding obliterates the important distinction between *content*-neutrality and *viewpoint*-neutrality.

A viewpoint-based exclusion occurs when government "denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141, 2147 (1993) (internal quotation marks and citation omitted). By contrast, a content-based exclusion is one "based upon either the *content or subject matter* of speech." *Heffron v. ISKCON*, 452 U.S. 640, 648 (1981) (and cases cited) (internal quotation

marks omitted). Thus, subject matter exclusions (e.g., no abortion-related advocacy) are undeniably *content*-based, even if simultaneously *viewpoint*-neutral.

The distinction between content- and viewpoint-discrimination is an important feature of this Court's precedents. Content neutrality is a "major criterion" for a permissible "time, place and manner" restriction on speech in a public forum. *Heffron*, 452 U.S. at 648. *Accord United States v. Grace*, 461 U.S. 171, 177 (1983). In nonpublic fora, content-neutrality is not essential. *Lamb's Chapel*, 113 S. Ct. at 2141. Viewpoint-neutrality, however, is a constitutional prerequisite in both public and nonpublic fora. *Id.*

The present case involves blatant content-discrimination: abortion-related speech is excluded, while speech on other topics is allowed.[2] Yet the court below ruled that because DFI excluded both sides of the issue—i.e., both viewpoints—the booth policy was a "content-neutral" time, place, and manner regulation.

This holding squarely conflicts with the teachings of this Court.

B. Unbridled discretion

This Court has repeatedly condemned licensing schemes that give authorities unbridled discretion to decide who may and may not speak in a public forum. Yet the court below upheld a policy whereby DFI "reserves the right" to deny booths to any organization DFI "deem[s] inappropriate" to the "theme and purpose" of its festival.

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[2] Content-based restrictions trigger strict scrutiny, i.e., government must show that the restriction is narrowly tailored to further a compelling government interest. *Grace*, 461 U.S. at 177. Neither the Court below nor DFI has suggested that DFI has any compelling interest in censoring out speakers just because DFI deems their message "inappropriate."

A "government regulation that allows arbitrary application is inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Forsyth County v. Nationalist Movement*, 112 S. Ct. 2395, 2401 (1992) (internal quotation marks and citation omitted). *Accord Lovell v. Griffin*, 303 U.S. 444 (1938) (overturning wholly discretionary permit requirement for literature distribution); *Cox v. Louisiana (Cox I)*, 379 U.S. 536 (1965) (overturning ban on obstruction of public passages where enforcement left to unbridled discretion of authorities); *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969) (overturning wholly discretionary permit requirement for parades and demonstrations). "The reasoning is simple: If the permit scheme involves appraisal of facts, the exercise of judgment, and the formation of an opinion . . . by the licensing authority, the danger of censorship and of abridgment of our precious First Amendment freedoms is too great to be permitted." *Forsyth*, 112 S. Ct. at 2401-02 (internal quotation marks and citation omitted). "To curtail that risk, a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority." *Id.* at 2401 (internal quotation marks and citations omitted).

DFI's policy represents the antithesis of these constitutional requirements. The criterion for exclusion—"inappropriate to the theme or purpose"—is broad, subjective, and indefinite. The licensing authorities necessarily will appraise facts, exercise judgment, and form opinions—all in the name of a murky determination of what is "appropriate."[3] The right to present one's message on equal

[3] This is not a case, for example, where participation is limited to some discrete, specialized group such as "pumpkin farmers." On the contrary, the "Great Pumpkin" theme apparently requires no more than festive Halloween decorations—something CARTL can do (and alleged that it would do) as well as a humane society, a church, or an antique shop.

terms thus rests at the mercy of the vote of DFI's board. In short, DFI exercises completely unbridled discretion as to who may and may not participate in a public forum otherwise open to all comers.[4]

CONCLUSION

One of the proudest boasts of the United States is the freedom of speech. The First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In this country, people forge new ideas and revolutionize conditions by waging war, not with guns or bricks, but with words.

The decision below betrays this basic constitutional principle. By upholding censorship based on "appropriateness," the Supreme Court of Kentucky has endorsed DFI's attempt to push the abortion debate out of the marketplace of ideas. No principle prevents this same logic, applied here to a festival held on a pedestrian right of way, from justifying the exclusion of other "controversial" topics from such fora as public school facilities open after hours to public use, *but see Lambs Chapel*, state fairs, *but see Heffron*, public theaters, *but see Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), or other public fora.

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

In view of the clear and dramatic departure of the Supreme Court of Kentucky from this Court's well-

[4] The court below defended the policy by noting that CARTL members were free to roam the festival accosting passersby, 862 S.W.2d at 301 (App. 9a)—hardly an adequate alternative to a booth in which one may feature one's own message on terms equal to other booth operators. "The First Amendment protects [speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988).

established First Amendment jurisprudence, this Court should consider disposing of this petition by summary reversal of the judgment below under Rule 16.1.

Respectfully submitted,

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January 26, 1994

APPENDICES

APPENDIX A

SUPREME COURT OF KENTUCKY

92-SC-347-DG

CAPITAL AREA RIGHT TO LIFE, INC.,
Movant

v.

DOWNTOWN FRANKFORT, INC., and JOHN GRAY, INDIVIDUALLY and JOHN GRAY AS PRESIDENT OF DOWNTOWN FRANKFORT, INC.,
Respondents

On Review from Court of Appeals
90-CA-2564
Franklin Circuit Court
Hon. Squire N. Williams, Jr., Judge
90-CI-1636

OPINION OF THE COURT BY JUSTICE LEIBSON

AFFIRMING

The respondent, Downtown Frankfort, Inc. (DFI) is a nonprofit corporation established to promote downtown revitalization in Frankfort, Kentucky. John Gray is its president. As one of its activities, DFI organized and sponsored a "Great Pumpkin Festival" as a special event to be held on the city's St. Clair Mall, on Saturday, October 27, 1990.

Capital Area Right To Life, Inc. (CARTL) had a booth at the 1989 Festival, but was denied a permit to have a booth at the 1990 Festival, being advised by letter from President John Gray that DFI had decided upon a "policy on the issue of festival participation" under which "theme festivals, events, and booths are meant to be for fun and entertainment, [and] DFI reserves the right to deny participation to any displayer/merchandiser deemed inappropriate to that theme and purpose." Additionally, Gray advised CARTL orally that it could not have a booth because it was a "controversial group." This 1990 festival policy evolved because, at the 1989 Festival, DFI had received complaints from many festival-goers, as well as other festival participants, about the inappropriateness of advocacy groups such as CARTL participating in a family-oriented Halloween/Fall Festival. At oral argument both sides took note that, at the 1989 Festival, CARTL's booth had distributed plastic models of fetuses in little baskets.

The record shows that DFI's 1990 festival policy was applied evenhandedly in that CARTL's counterparts, Kentucky NOW and the Kentucky Religious Coalition for Abortion Rights, were also denied participation as not in keeping with the Halloween/Fall Harvest theme of the "Great Pumpkin Festival."

CARTL filed suit in Franklin Circuit Court against DFI and Gray alleging "the actions of the Defendants jointly and severally deprived the Plaintiff of its rights under the First and Fourteenth Amendments to the United States Constitution (more specifically, abridging the freedom of speech), unlawfully restricts the use of public property and denies to the Plaintiff equal access to a public forum." CARTL sought relief under the Kentucky Declaratory Judgment Act (KRS Chapter 418) and the Federal Civil Rights Act (Title 42, U.S. Code, Sec. 1983).

The trial court denied the injunction and entered summary judgment for the defendants, Gray and DFI. The Kentucky Court of Appeals panel affirmed; one judge dissented. Because the case involves freedom of speech, a constitutional issue of great public importance, we granted discretionary review. For reasons to be stated, we affirm.

The evidence in this case consists solely of affidavits filed on behalf of the parties concerned. These affidavits are not in conflict on any facts material to deciding this controversy. Thus, while we differ with the trial court and the Court of Appeals about the reasons for deciding DFI's actions did not violate CARTL's constitutional rights, we agree this was a proper case for summary judgment.

On appeal, CARTL addressed, for the first time, freedom of speech provisions in our Kentucky Constitution (Ky. Const., Sec. 1(4) and Sec. 8), in addition to the federal constitutional law arguments CARTL presented at the trial level. We will not undertake to decide whether the right to frame arguments based on the Kentucky Constitution has been lost by procedural default, because CARTL offers no differences between the two constitutions pertinent to the issues in this case.

This case was decided in the trial court and in the Court of Appeals on grounds that DFI and Gray are private parties, not public entities, and that the Fourteenth Amendment, and through it First Amendment rights, do not apply to private parties unless those parties are engaged in activity deemed to be "state action." *Jackson v. Metropolitan Ed. Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). Having stated the issue in the simplest of terms, the application of the principle became exceedingly complicated. Both courts below engaged in labored analysis of various factors and tests applied to decide the "state action" question in a multiplicity of decisions (most of them unrelated to abridging

or restricting free speech), ultimately deciding that DFI and Gray were not state actors when they denied CARTL a permit to operate a booth at the festival.

The trial court analyzed the case using three tests: the "public function test," which asks whether private actors are "performing functions traditionally the exclusive prerogative of the city"; the "state compulsion test," which asks whether "the city has exercised coersive [sic.] power or has provided such significant encouragement, either overt or covert, that choice must in law be deemed to be that of the city"; and the "nexus test" which asks whether the city and DFI were "intertwined in a 'symbiotic relationship' " such that they were "joint participants." The trial court concluded:

> "Applying the three tests to the facts at hand it becomes apparent that DFI was not performing a city function. It follows that the plaintiff was denied no constitutional right."

The Court of Appeals took the inquiry one step further, addressing the question posed in *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482, 497 (1982):

> "Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation. . . . 'Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.' "

After separately analyzing the factors and tests applied in many different cases, the Court of Appeals concluded:

> "From all the foregoing we have observed that every case must be examined from the facts of each situation; that the receipt of state funds does not convert private actors to state actors; and that in the case at bench the government is not in the business of conducting festivals. Neither can it be said that there was any duty, legal or otherwise, for the city or county to promote or revitalize downtown Frankfort or, for that matter, any other area within their respective boundaries. . . . CARTL has failed in establishing that DFI was performing a public function."

The Court of Appeals reached its decision by separately analyzing each reason proffered for attaching the "state action" label to DFI's activities, and then rejecting each in turn on the basis DFI's activities did not prove state action. The Dissenting Opinion by Judge Huddleston reached the opposite conclusion by considering DFI's activities in the aggregate. Judge Huddleston conceded that "examined separately and in light of existing United States Supreme Court decisions these factors do not individually represent a significant degree of state action," but concluded "as the Supreme Court has stated, 'the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility.' *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45, 50 (1961)." We agree with the Court of Appeals' Dissenting Opinion that "[u]pon weighing the circumstances of this case" in the "aggregate," DFI qualifies as a state actor.

There are many factors that point to this conclusion. DFI is incorporated as a private, non-profit corporation, but its purpose is to bring about "revitalization" of Downtown Frankfort. This is a function it took over from the city to the extent of carrying out the "Main Street Program," which is operated under the patronage and guidance of the Kentucky Heritage Council, an agency of state government under the Education and Humanities

Cabinet. KRS 171.3801 and 171.381. DFI's principal funding is from monies received from the Kentucky Heritage Council, from the City of Frankfort, and from the Franklin County Fiscal Court, although it also charges dues to its members and presumably accepts private contributions.

One of the functions of the Kentucky Heritage Council is the "administration" of a "grants program" which includes the "Main Street Program," the impetus behind the "Great Pumpkin Festival." The unrefuted affidavit from John R. Sower, formerly Mayor of the City of Frankfort from 1978-82, filed on behalf of CARTL states:

> "Downtown Frankfort, Inc., has in fact taken over a function formerly performed by the City of Frankfort. The City used to hire its own staff to promote the revitalization of downtown as a place to live, visit, shop, invest, etc. During the affiant's term as Mayor, the City received a 'Main Street' program fund for this purpose and hired Randy Shipp and Todd Graham to promote downtown Frankfort."

Finally, and of great significance, the St. Clair Mall upon which this festival is conducted is a public area, but a permit for a booth on this public area must be obtained from DFI: "no formal city permit is issued." Thus the city has delegated to DFI control over the St. Clair Mall, albeit only to the limited extent of deciding who shall be permitted to maintain booths there during the hours of the festival.

These facors leave no room to doubt that the activities engaged in by DFI in conducting the "Great Pumpkin Festival," in the aggregate, constitute state action.

In one of the latest U.S. Supreme Court cases on the subject of state action, *Edmonson v. Leesville Concrete Co.*, 500 U.S. ——, 111 S.Ct. 2077, 114 L.Ed. 660 (1991), a case cited by both sides as supporting author-

ity, the Court held that the exercise of peremptory challenges by private litigants in civil cases, if exercised in a racially discriminatory manner, involves sufficient "interdependence" or "joint participation" in the exercise of governmental authority that it should be viewed as state action. The Court considered the private party status of the actor outweighed by the public nature of the function being performed: ". . . when private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance." *Id.* at 678.

The *Edmonson* case supports CARTL's "state action" claim in this case. Like the Leesville Concrete Co. in *Edmonson*, here DFI's case against classifying its activities as state action rests on its claim it is a private nonprofit organization rather than a state agency. This begs the question. In the context of the issue before us, DFI's right to restrict participation by CARTL in the "Great Pumpkin Festival," the issue is whether DFI is involved in a "symbiotic relationship" with government, a relationship involving close, mutually beneficial association of two dissimilar entities. What constitutes a "symbiotic relationship" is a multifaceted question, elusive because the term has different meanings depending upon the context of the case. *See* for discussion: *Edmonson v. Leesville Concrete Co., supra; Burton v. Wilmington Parking Authority, supra* and *West v. Atkins,* 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

Thus we conclude that in conducting the "Great Pumpkin Festival" and setting policy as to what individuals, groups or organizations could maintain booths at the festival, the activities of DFI and Gray constituted state action. But this does not end the inquiry: state action of this nature does not necessarily abridge the constitutional right of free speech. This, also, depends on the circumstances. From the many cases cited to us, the U.S. Supreme Court case that seems closest to the present one factually, and the case which we look to for guidance, is

Heffron v. Int'l Soc. Krishna Cons., 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981).

In *Heffron*, the Minnesota Agricultural Society, a public corporation charged with operating Minnesota's annual state fair, restricted the activities of the Krishna's Society to distributing literature and soliciting donations within the fairgrounds to assigned locations. Its rules "require that any exhibitor conduct its sales, distribution, and funds solicitation operations from a booth rented from the Society. Space in the fairgrounds is rented to all comers in a nondiscriminatory fashion on a first-come, first-served basis with a rental charge based on the size and location of the booth. The Rule applies alike to nonprofit, charitable, and commercial enterprises." 452 U.S. at 644. "[T]he Rule does not prevent organizational representatives from walking about the fairgrounds and communicating the organization's views with fair patrons in face-to-face discussions." *Id.* at 643-44.

There is no doubt the public agency engaged in conducting the state fair was engaged in state action. Yet the Opinion upholds the restrictions in the state fair rules against First Amendment challenge. The Court takes note that "[t]he State does not dispute . . . Krishnas' religious views and doctrines is protected by the First Amendment." 452 U.S. at 647. The Court then states the following principle applicable in cases of this nature:

> "It is also common ground, however, that the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired. [Cases cited.] . . . the activities of ISKCON [the Krishna Society], like those of others protected by the First Amendment, are subject to reasonable time, place, and manner restrictions. [Cases cited.] 'We have often approved restrictions of that kind provided they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in doing so they leave open ample alternative channels for communication of the information.'. [Cases cited.] The issue here . . . . is whether Rule 6.05 is a permissible restriction on the place and manner of communicating the views of the Krishna religion, ..." *Id.* at 647-48.

We consider the issue before us the opposite side of the same coin. We interpret "content-neutral," as used in *Heffron*, to include being neutral as to the type of message the restriction permits as well as being nondiscriminatory between messages of the same type, so long as there is a logical and legitimate reason for restricting the type of message. The issue here is not whether DFI was involved in state action in regulating the use of the Mall, but whether the manner in which it regulated the use of the Mall on this occasion constituted "reasonable time, place, and manner restrictions." *Heffron, supra*, 452 U.S. at 647. DFI was engaged in restricting those who could maintain a booth to entities consistent with the festival's theme and subject matter. Thus the St. Clair Mall was a public area, but its use on this occasion is analogous to the use of the fairgrounds in the *Heffron* case. So long as it applied its policy in an evenhanded, nondiscriminatory manner consistent with a legitimate purpose expressed in a specified policy, its policy is content-neutral in the only sense that is important to this case.

CARTL and its counterparts were free to walk about the Mall and exercise the right of free speech free of any supervision or restriction from DFI. The Mall was not a private area policed by DFI security officers, but a public area, the policing of which was left to public officials. DFI did not deny access to the St. Clair Mall to persons or organizations wishing to engage in "controversial" speech; it only denied such entities a permit for booth space during the hours of the festival.

It is a critical fact in this case that CARTL's counterparts, NOW and the Religious Coalition for Abortion

Rights, were also denied booths in keeping with the festival's theme. It is also a critical fact that the scope of DFI's activities did not include controlling speech on the Mall in any manner except restricting permits for booths to groups consistent with the theme of the festival. None of these organizations were in any manner prohibited from using the Mall to communicate freely with others attending the festival, not limited in any way by DFI and Gray, but limited only by the lawful exercise of police power in a public place by public agencies. Given these facts we see no significant difference between the reasonableness of the limitations on the Krishna Society in the *Heffron* case, and the limitations on CARTL in the present case.

In *Heffron* the U.S. Supreme Court stated:

> "Furthermore, consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be asserted in light of the characteristic nature and function of the particular forum involved." 452 U.S. 650-51.

The restriction here was consistent with "consideration of [the] forum's special attributes." The restriction did not address the content of the mesage, but only the type of message for which a booth would be suitable. It did not restrict the exercise of free speech at the festival except to limit the "manner" of its exercise. Like *Heffron* it was a reasonable limitation on "time, place and manner."

For the reasons stated, we affirm.

Stephens, C.J., Combs, Leibson and Reynolds, JJ., concur. Spain, J., concurs in results, but further concludes that the actions of DFI did not amount to state action under the circumstances.

Wintersheimer, J., dissents by separate opinion in which Lambert, J., joins.

DISSENTING OPINION BY JUSTICE WINTERSHEIMER

I respectfully dissent from the majority opinion because the discriminatory activities of DFI in refusing a booth at the Great Pumpkin Festival to Capital Area Right to Life, Inc. constituted impermissible state action and as such is a clear denial of the constitutional right of free speech.

The majority opinion notes that we must look for guidance to *Heffron v. International Society of Krishna Cons.*, 452 U.S. 640, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981), and then states that it considers the issue before this Court as the opposite side of the same coin. The majority opinion proceeds to interpret "content-neutral" in a rather novel manner in which the use of the public square was regulated by DFI so as to discriminate. It is an illusion to claim that those who were denied the right of a booth could freely circulate in the mall area and consequently their free speech rights were not abridged. Certainly such a contention begs the question. Anyone could exercise free speech in the public square; the discrimination lies in the prohibition to fully participate with a booth in the festival. It is obvious that the application of the policy by DFI was not even-handed and was discriminatory with no legitimate relationship to any proper public policy.

Unfortunately, the majority opinion has totally misunderstood *Heffron, supra*, and misapplied it to this situation. Candidly, the majority opinion admits that its interpretation of *Heffron* is the "opposite side of the same coin." However, *Heffron* was a case where the United States Supreme Court, in unmistakably clear language, reversed a decision by the Minnesota Fair Board which would have restricted Krishna to their booth. Clearly all the parties in that case accepted the fact that the Krishna had a right to have a booth at the fair. The only legal

issue was the right to restrict the Krishna participants from leaving the booth and walking around through the crowd. The Supreme Court determined that the state fair rule did not violate the First and Fourteenth Amendments because there was a defined standard for participation by means of circulation in the crowd and that the group was not denied the right to arrange for a booth and distribute literature or solicit funds from such a location.

In this case, the right to fully participate by means of a booth was denied by DFI although the majority opinion generously allows CARTL members to walk through the festival and exercise free speech without supervision or restriction.

To say that an individual enjoys freedom of speech except as to the question of the content of the speech is contradictory to the real meaning of the First Amendment. It is similar to saying you have a right to free speech as long as the state can control what you say. Such an analysis is seriously flawed.

The majority opinion may be sincere in stating that "CARTL and its counterparts were free to walk about the mall and exercise their free speech without any supervision or restriction from DFI." It is a non sequitur to say that DFI only denied a permit for booth space and not the right to engage in what it calls "controversial speech."

If the state has a right to examine the content of speech and to deny its free exercise simply because it denies the free exercise of others, then free speech means nothing. This case is only about free speech. It is not about abortion.

In this case there is no record of any disturbance or controversy. Consequently there is no factual, legal or logical basis in the record on which DFI could deny a booth permit to any of the groups requesting booth

space. There is no evidence of disorder or even a record of any single complaint. Considering the vague unspecified generalities on which DFI bases its discriminatory behavior, one could only conclude that it is simple, unadulterated censorship. The rhetoric of the majority opinion cannot dispel this simple unvarnished fact.

The majority opinion has stumbled over the threshold of free speech and has fallen into the morass of a misinterpretation of the term "content-neutral." Apparently, the opinion cannot get up. The neutrality of the standards governing the licensing authority must be objective, definite and nondiscriminatory. *See Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). It is the regulation that must be content-neutral rather than a direct inquiry into the nature of the speech. The content is important only as it relates to a significant government interest in maintaining orderly crowd movement or the public health or safety. Any restriction on free expression should not be overly intrusive. Perhaps this is a difficult concept to grasp, but it is most important in determining the right to free expression.

When public property is used to promote a public purpose such as revitalization, the fact that the government is involved requires open access to all the public. An entirely private fund and entertainment festival or promotion is free to do as it chooses, but that is not so when government funds or public property is involved. It has been held that the lease of a city convention hall is not state action and that a private entity could refuse to allow the press and supposedly the public into the convention hall. *Cf. NBC v. Communication Workers of America*, 860 F.2d 1022 (11th Cir. 1988).

The decision of DFI to ban CARTL's booth was not content-neutral, rather it was entirely content-based. It amounts to simple prior restraint or censorship. It is

based on what is said while totally ignoring the right to say it.

The analysis provided by the majority opinion might well be thought of by Kentucky legal scholars as an excellent example of true judicial activism. The issue of content-neutral was only marginally discussed in either briefs, trial or appellate court. DFI, in its brief, states that *Heffron, supra*, is not on point because the Minnesota action was obviously state action. The majority opinion clearly admits several times that the festival committee qualified as a "state actor." It states "we agree with . . . the dissenting opinion" that DFI qualifies as a state actor.

The facts are very critical to a complete understanding of this case. Downtown Frankfort, Inc. is a nonprofit corporation whose exclusive purpose is the revitalization and promotion of the downtown Frankfort area as a business and commercial center and as a desirable place for people to live, work, shop and visit. The record indicates that DFI organizes various public events on the city streets and sidewalks and the city-owned St. Clair Mall.

The event in question is named "The Great Pumpkin Festival" and was held October 27, 1990. DFI sponsored the same festival in 1989 and an affidavit from the secretary of the organization indicates that the permission received from city government to use the mall area was to hold "Great Pumpkin" activities and to allow vendors, civic groups and others to set up sales and informational booths. Capital Area Right to Life received permission from DFI to participate in the 1989 event and set up a booth. The record is devoid of any incident or disturbance of any kind relating to the Right to Life booth. An affidavit in the record indicates that a similar festival entitled "Dog Days" was sponsored by DFI in August of 1990 and CARTL was denied a booth. However, two months prior to the Pumpkin festival, DFI's President Gray indicated that Right to Life would be welcomed

"with open arms" at future events. The record indicates that DFI placed an ad in the local newspaper, The State Journal, soliciting participation from various civic organizations by means of booth rental. When CARTL applied for a booth, DFI's president denied the request as "too controversial."

On October 2, 1990, the DFI Board of Directors adopted a festival policy which reserved to it "the right to deny participation to any display or merchandiser deemed inappropriate to that theme and purpose" which was fun and entertainment. At the same meeting DFI again denied CARTL's request for a booth on the basis that such participation was inconsistent with the new festival policy.

In 1990, DFI was primarily funded with public money from the City of Frankfort, the Franklin County Fiscal Court and the Kentucky Heritage Council and some membership dues. Members of the board at that time included officials from the city, county and Heritage Council.

The festivals sponsored by DFI are held exclusively on public property, either a mall, sidewalk or city streets. Apparently no written permit was ever issued by the city to DFI.

Other critical facts involve a dispute between counsel at oral argument as to whether the CARTL advocates were orderly or otherwise. There is nothing in the record indicating any disruption of any activity. The statements by DFI that CARTL is too controversial are vague and undocumented. At oral argument, counsel for DFI admitted that there had been no record kept of any of the alleged complaints. In fact, DFI does not assert that there was any disorder, only that the group was "too controversial" and "inappropriate." CARTL maintains that it distributed 200 balloons and had available literature and other information in 1989. DFI contends that

the CARTL activities were bothering some people attending the festival. Again, the record is totally silent as to any question of disorder or disruption.

As conceded by the majority opinion, DFI was a state actor. Certainly, totally private conduct, whether discriminatory or even wrongful, is not prohibited by the Fourteenth Amendment to the Federal Constitution. Anyone who engages in a purely private activity does not invade individual rights unless the State becomes involved to some significant extent. *Cf. Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). However, private persons and entities may be held to be state actors where the alleged infringement of a right is fairly attributable to the State. *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

There have been various tests applied to state action. The functional approach has been most recently noted in *Georgia v. McCollum*, 505 U.S. ——, 112 S.Ct. 2348, 120 L.Ed. 2d 33 (1992). It is interesting to note that although this case was decided on the basis of a summary judgment, the United States Supreme Court in *Edmonson v. Leesville Concrete Company*, 500 U.S. ——, 114 L.Ed.2d 660, 111 S.Ct. 2077 (1991), held that the issue of whether private conduct constitutes state action is a factual inquiry. The seemingly simple question of ascertaining whether any private individuals become state actors can result in a complex legal situation. *Reitman v. Mulkey*, 387 U.S. 369, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967) stated that the effort to determine "neutral principles" in the area of government action was an impossible task.

Any extension of the philosophy unwittingly expressed by DFI in this situation could possibly exclude a booth by an environmental group, the NAACP or a church with religious articles of any kind on display or any literature connected therewith. Certainly, I doubt the State can justify restrictions that exclude anyone on the basis

of race, gender, religion or free speech simply by delegating a governmental function to a private entity or by permitting a private party to assume a governmental function.

It would appear that DFI has perhaps unthinkingly subjected individuals and other groups to a prior restraint on any participation at a public event on public property. Surely the State cannot selectively exclude individuals or groups from participating in public activities based on a subjective determination that such an individual or group is "inappropriate" to its theme or purpose or that it is "too controversial" without any supporting evidence and without any record of previous disturbance. Obviously the question becomes what is inappropriate and who determines what is inappropriate.

When it is decided that an individual or group cannot fully participate in a public event then the use of State property as a traditional public forum for the exercise of the fundamental right of free speech is dramatically restricted. Legitimate First Amendment rights have been infringed. *Cf. Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

Once the majority opinion recognizes that DFI engaged in state action, the ultimate decision should be obvious. The right to freedom of expression and free speech by means of participation in the festival with a booth should be clear. Such a right should be held by any group in the absence of some obvious danger to public safety or health. The record here discloses no such danger. Any group would enjoy the same right to free expression. The public enjoys the right not to listen to the message of any group, but that is the right of the individual and the State may not suppress the message.

In *Heffron*, there was no dispute that Krishna was entitled to a booth at the Minnesota State Fair. CARTL repeatedly argues that the booth was a "given". The

United States Supreme Court observed that space at the Minnesota fair was rented in a nondiscriminatory fashion, on a first come/first served basis and that this allocation applied alike to nonprofit, charitable and commercial enterprises. The method of allocating space in *Heffron, supra,* was not open to the kind of arbitrary allocation that the U.S. Supreme Court has condemned as inherently inconsistent with a valid time, place and manner regulation. However, such discretion has the potential for becoming a means of suppressing a particular point of view.

Heffron correctly notes that valid time, place and manner restrictions on the exercise of First Amendment rights must serve a significant governmental interest and *may not be based on either the content or subject matter of the speech.* (Emphasis added.)

The seeming assumption by DFI that they can exclude everyone from expressing their First Amendment rights is without any foundation in law. Although it may be unintentional it is a clear abridgement of the right to free speech.

The United States Supreme Court noted in *Heffron* that:

> These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.

69 L.Ed.2d at page 309.

It should be clear that when a private party acting as the State, sponsors an event open to the general public on public property, it cannot exclude certain participants on the basis of a vague, standardless policy. The First Amendment protects expressions of speech in public places whether such expressions are popular or unpopular.

It does not require citation for the court to recognize that free speech rights have been accorded to draft resisters and flag burners. Certainly the distribution of balloons and literature would seem not to be disruptive in any fun and entertainment festival.

This situation is very close to the establishment of a policy that determined who could use public property and be included in full participation in public events similar to that denounced in *Citizens to End Animal Suffering and Exploitation, Inc. v. Fanneuil Hall,* 745 F. Supp. 65 (D.Mass. 1990). In that case, Fanneuil Hall leased the marketplace from the City of Boston and refused to permit a citizen's group to distribute literature and protest inhumane treatment of calves. Fanneuil Hall was found to have engaged in state action and to have infringed on the group's right to free speech.

It has long been recognized that any regulation of First Amendment rights must be content-neutral and narrowly tailored to serve a significant governmental purpose or interest. *Cf. Perry Education Assn. v. Perry Local Education Assn.,* 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Here the restrictions placed by DFI are neither content-neutral nor narrowly tailored. Participation was denied to anyone whom DFI thought to be inappropriate.

There are innumerable cases relating to the limitation of the state or anyone acting on its behalf to restrict free expression. The cases cover almost every possible human activity. A brief sampling include the following:

> Government has no power to restrict expression because of its message, its ideas, its subject matter or its content . . .

Police Department of the City of Chicago v. Mosley, 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (1972).

> When the regulation is based on the content of speech, governmental action must be scrutinized

> more carefully to ensure that communication has not been prohibited merely because public officials disapprove of the speaker's view.

Consolidated Edison Company v. Public Service Commission, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980), quoting *Niemotko v. Maryland,* 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951).

> We have consistently rejected the suggestion that a government may justify a content based prohibition by showing that speakers have alternate means of expression.

Consolidated Edison, supra.

> To preserve civility is one thing; to insist that all dialogue proceed on a model of an ordered meeting should be quite another.

Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284, *Reh. Denied* 404 U.S. 876, 92 S.Ct. 26, 30 L.Ed.2d 124 (1971).

Legal writers have also expressed their views on this subject as follows: The autonomy of the individual and of the press from government's content based restriction is thus nearly absolute. Lawrence H. Tribe. *American Constitutional Law* § 12-8 at page 836, Second Edition, 1988, and the constitutional guarantee of free speech should not be avoided by government action which seeks to attain that unconstitutional objective under some other guise. *Tribe, supra.*

In a separate concurring opinion, Justice William O. Douglas of the United States Supreme Court in *Mulkey, supra,* stated in regard to an anti-discrimination statute involving real property that a provision that is a form of sophisticated discrimination in which the people harness the energy of private groups to do indirectly what the state cannot do should be condemned.

North Shore Right to Life Committee v. Manhasset American Legion, 452 F.Supp. 834 (E.D.N.Y. 1978), is similar to this case. There, members of the right to life group sought permission to march in a Memorial Day parade sponsored by the American Legion to be held on the public streets. The group was denied a permit. The Federal district court held that the First and Fourteenth Amendment require that a parade permit be issued.

Although DFI disputes the validity of *North Shore, supra,* it was followed in *Gay Veterans Association, Inc. v. American Legion,* 621 F.Supp. 1510 (S.D.N.Y. 1985); *Rubino v. City of Mt. Vernon,* 563 F.Supp. 907 (S.D.N.Y. 1982); and *Abel v. Town of Orangetown,* 759 F.Supp. 161 (S.D.N.Y. 1991).

An excellent discussion of this entire question can be found in *Irish Subcommittee v. Rhode Island Heritage Commission,* 646 F.Supp. 347 (D.R.I. 1986). In that case the Rhode Island Heritage Commission sponsored and funded a festival on city property with booths and tables for various ethnic groups. An organization interested in assisting Northern Irish people had participated two times in the past without incident. In 1985 the Rhode Island Heritage Commission refused further participation because they determined that the group was too political. The Federal district court issued a summary judgment in favor of Irish Northern Aid and allowed them to participate in the event with a booth. The district court held that political speech was entitled to First Amendment protection; that the function was on public property and that the booth was no less a public forum than the lawn beneath it to which access could not be restricted; and that the Rhode Island Commission's regulation was a content-based restriction of speech lacking compelling justification.

The district court went on to note that public inconvenience, annoyance and even unrest can never justify curtailment of speech in a public forum. Here, although

DFI argues that the CARTL presence was disruptive there is no evidence in the record of any such disruption, let alone a compelling justification.

The *Irish Subcommittee* noted in pertinent part:

> Government officials may not restrict access to a public forum merely because they disagree with the views to be expressed there . . . There is always a great danger that the standards for official approval will serve only as a mask behind which the government hides as it excludes speakers from the public forum solely because of what they intend to say.

646 F.Supp. at 357.

DFI's argument is that their interest in the fun and entertainment theme is sufficient justification for its exclusionary policy. A similar contention was previously rejected in *Toward a Gayer Bicentennial Committee v. Rhode Island Bicentennial Foundation*, 417 F.Supp. 632 (D.R.I. 1976). In that case the Rhode Island Foundation denied use of state property to the Gayer Committee during bicentennial events. The Rhode Island Commission's standard was based on programs that were "tasteful, appropriate and suitable." The Gayer Committee did not pass these tests but the U.S. District Court allowed them to participate fully in the event.

I would sharply differ with any implication that might be taken from the majority opinion that there is no difference between the federal and state constitutions. I believe that such an implication would be incorrect.

This case was entirely decided on the application of Federal law. However, it would appear that the decision of the trial court was erroneous because the conduct of DFI clearly violates the Kentucky Constitution.

Section 1 of the Bill of Rights guarantees to all people of Kentucky "The right of freely communicating their thoughts and opinions." Section 8 provides "Every person may freely and fully speak, write and print on any subject, being responsible for the abuse of that liberty." If the Kentucky Constitution had been invoked, it would appear that there is an even greater protection for the right of free speech than that provided in the United States Constitution.

Although it may be totally unintentional, DFI is clearly open to a charge of prejudice by relying on the vague standard they have adopted. This policy would seemingly permit DFI to exclude anyone from the use of public property if deemed inappropriate or if thought too controversial. Clearly this has an incredibly chilling effect on the First Amendment and other freedoms that should not be tolerated, particularly where public money, public purpose, public property and public attendance are significant factors.

Moving to a purely procedural and legal approach, it was error for the trial judge to grant summary judgment to DFI and fail to grant a temporary injunction to CARTL. Under the principles established by the U.S. Supreme Court, DFI engaged in state action and as a result, CARTL's constitutional right to free speech was infringed. DFI was a state actor whose broad and vague regulations were not content-neutral but were content-based and the application of the DFI policy violated the First Amendment to the Federal Constitution.

There were significant questions of fact that were not resolved in the summary judgment proceedings pursuant to *Steelvest v. Scansteel Service*, Ky., 807 S.W.2d 476 (1991). A movant should not succeed unless the right to judgment is shown with such clarity that there is no room for controversy.

In any event CARTL was entitled to injunctive relief under *Maupin v. Stansbury*, Ky. App., 575 S.W.2d 695 (1978) because there was irreparable injury in the loss of First Amendment rights even for a minimal period of

time. *Elrod v. Burns*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). The failure to obtain preliminary relief through injunction resulted in the complete and permanent denial of CARTL's opportunity to participate in the festival. Clearly, such injury is irreparable. The issuance of a temporary injunction was absolutely necessary to maintain CARTL's right pending a full decision on the merits and a substantial claim to a personal right of free speech was alleged. *Cf. Commonwealth ex rel Cowan v. Wilkinson*, Ky., 828 S.W.2d 610 (1992).

Here DFI clearly focuses on the content of the speech and as a result the State has engaged in a prior restraint. It doesn't matter that everyone is excluded. It only matters that anyone is excluded. The decision of DFI is not content-neutral, it is content intensive. The decision was entirely based on content.

I would reverse the decision of the Court of Appeals and the trial court.

Lambert, J., joins this dissent.

APPENDIX B

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I

Case No. 90-CI-01636

CAPITAL AREA RIGHT TO LIFE, INC.,
Plaintiff,
v.

DOWNTOWN FRANKFORT, INC., JOHN GRAY,
INDIVIDUALLY and AS PRESIDENT OF
DOWNTOWN FRANKFORT, INC.,
Defendants

[Filed Oct. 26, 1990]

ORDER

The city of Frankfort granted permission to Downtown Frankfort, Inc. (DFI) to use St. Clair Mall on Saturday, October 27, 1990 as a place to hold a "Great Pumpkin Festival". The theme of the festival is "Halloween and Fall Harvest". DFI has adopted a policy which denies any group activity which would not be in keeping with the theme or spirit of the festival.

The plaintiff, Capital Area Right to Life, Inc. was denied the right to participate in the festival on the ground its activities would not be in keeping with the theme or spirit of the festival. Two other groups were denied the right to participate for the same reason.

By this action plaintiff seeks an injunction directing DFI to provide to it space for a booth at the festival. The defendants have moved the Court to dismiss, treated as motion for summary judgment.

Plaintiff argues that Defendants' denial deprives it of its First Amendment rights. We have been cited no State cases on the subject, but the record is replete with Federal cases, from the Supreme Court on down. In the interest of brevity and because of the time constraints this Order does not attempt to define or distinguish each of those cases. Suffice it to say they all espouse a common theme.

Primarily it is established that First Amendment rights do not apply to private parties unless those parties are engaged in activity deemed to be "state action". It has been written in fact, that the Fourteenth Amendment, and, through it the First Amendment, erects no shield against merely private conduct, however discriminatory or wrongful. See NBC V Communications Workers of America, AFL-CIO, 860 Fed (2) 1022 (11th Cir. 1988).

The question here is whether DFI was performing a city function when it denied the plaintiff the right to maintain a booth. As heretofore noted the defendants have been granted permission to use the city mall, an area ordinarily available to the general public. Is denial of the right to use that area then a city action? If so plaintiff has a right to exercise its perogative under the First Amendment and maintain a booth at the festival.

The Supreme Court has suggested three primary tests to be used in evaluating government action: (1) The public function test; (2) the state compulsion test; and (3) the nexus/joint action test.

The public function test covers private actors performing functions traditionally the exclusive prerogative of the city. Conducting festivals and assigning booths to participants is not an exclusive function of the city.

The state compulsion test provides that a city may be held responsible for a decision made by a private actor only when the city has exercised coersive power or has provided such significant encouragement, either overt or covert, that choice must in law be deemed to be that of the city. Blum V Yaretsky 102 S. Ct. 2777 (1982). It is readily apparent the city neither coerced nor encouraged the action of DFI. In fact, both city and county representatives on the defendant's board voted to permit the plaintiff to operate a booth.

The third, the nexus test has been satisfied by the recognition that the defendant has not exercised powers that are traditionally the exclusive prerogative of the city. Nor has the city placed itself into a position of being a joint participant with the defendant in the conduct of the festival. Thereby satisfying the joint action test. The city and DFI were not intertwined in a "symbiotic relationship" which would be necessary if they were said to be joint participants. Jackson V Metropolitan Edison Company, 95 S. Ct. 449 (1974).

Applying the three tests to the facts at hand it becomes apparent that DFI was not performing a city function. It follows that the plaintiff was denied no constitutional right.

Accordingly, it is hereby Ordered that plaintiffs motion for an injunction is Overruled and defendants motion for summary judgment is Sustained and this action is Dismissed.

This the 26 day of October, 1990.

/s/ Squire N. Williams, Jr.
SQUIRE N. WILLIAMS, JR.
Special Judge
Franklin Circuit Court
Division I

APPENDIX C

RENDERED: April 17, 1992

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 90-CA-2564-MR

CAPITAL AREA RIGHT TO LIFE, INC.,
Appellant

v.

DOWNTOWN FRANKFORT INC., and JOHN GRAY,
INDIVIDUALLY and AS PRESIDENT OF
DOWNTOWN FRANKFORT, INC.,
Appellees

Appeal from Franklin Circuit Court
Honorable Squire N. Williams, Special Judge
Civil Action No. 90-CI-1636

AFFIRMING

BEFORE: LESTER, CHIEF JUDGE, EMBERTON and HUDDLESTON, Judges.

LESTER, CHIEF JUDGE. This is an appeal from a summary judgment supported by an opinion in a declaratory judgment action the effect of which was to dismiss appellant's complaint.

With the exception of John Gray the parties hereto are nonprofit corporations. Capital Area Right To Life (CARTL) promotes the principles which its name indicates while Downtown Frankfort's (DFI) efforts are devoted to improving the image of the city's core area as a residential, shopping and working district. To further its objectives DFI annually organized and sponsored two major theme festivals known as "Dog Days" in August and "The Great Pumpkin Festival" in October, the latter of which was held on St. Clair Mall. Part of the activity at the festival was to permit vendors, civic groups and others to set up sales and promotional booths. It was basically a family oriented, Halloween/fall harvest theme, type of function.

In 1989 DFI had no expressed policy on festival participation and during that year's gala it permitted appellant to maintain a booth. Thereafter, complaints were received from participants and attendees about the appropriateness of having advocacy groups participating, so in 1990 DFI denied a festival place to CARTL. This action was based upon a policy adopted by DFI's Promotions Committee following the 1989 festival, that in its discretion DFI could withhold permission to any group whose activity would not be in keeping with the theme of the function. The City of Frankfort granted use of the Mall for seven hours on Saturday, October 27, 1990. Interestingly enough, not only was CARTL refused permission to participate but also so was Kentucky NOW and the Kentucky Religious Coalition for Abortion Rights. CARTL sought reconsideration which resulted in the DFI Board of Directors instructing its President, John Gray, to so notify it which he did by a letter stating, in part:

> Since DFI sponsored theme festivals, events, and booths are meant to be for fun and entertainment, DFI reserves the right to deny participation to any displayer/merchandiser deemed inappropriate to that theme and purpose.

In order to properly address the primary issue presented to us, we must first examine the structure of DFI.

As noted above, it is a nonprofit corporation organized under the appropriate statutes of this Commonwealth. It has a governing Board of seventeen directors, fourteen of whom are elected by the corporate membership while the remaining three positions are held by a representative each from the City of Frankfort, the Franklin County Fiscal Court and the Frankfort-Franklin County Chamber of Commerce. DFI receives funding from the City of Frankfort, the Franklin County Fiscal Court, the Kentucky Heritage Council and its own membership. We think it noteworthy that at the meeting on October 2, 1990, the city representative, one Kenneth L. Thompson, voted against both the adoption of a festival participation policy and the denial of CARTL's application for a booth. Moreover, the Franklin County Attorney, by letter, urged DFI not to deny appellant's request.

On October 18, 1990, the appellant filed its declaratory judgment action naming the corporate defendant as a party defendant together with its president as an individual. We have closely examined this document and we believe one observation should be made. Although Gray's relationship to the corporation is mentioned in the body of the complaint, absolutely nothing is requested against him or from him in the prayer of the document. All too often a disgruntled plaintiff, when seeking relief from corporate or governmental agencies, finds it expedient to name officers or office holders in an individual capacity when either no individual liability exists or none is requested to be established. This merely clutters the record and is not viewed with favor by the courts unless a party reasonably expects to be successful against the individual. In this record there is not even the slightest suggestion of relief sought against Gray in his *individual* capacity.

In the court below the appellant argued that it had been denied its rights under the First Amendment to the Federal Constitution, but as the learned trial judge correctly pointed out neither the Fourteenth Amendment, nor through it the First Amendment, erects a shield

against merely private conduct, however discriminatory or wrongful. Keeping in mind the CARTL sought a declaration of its rights under 42 USC 1983 it then became incumbent upon the lower tribunal to determine if the denial by DFI was state action which, of course, would have necessitated the appellees being adjudged state actors as opposed to private parties.

Appellant, relying on *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982), seeks to bring the private entities within the cloak of state actors, and thus state action, when the Supreme Court in *Lugar* quoted *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), to the effect:

> Private persons, jointly engaged with state officials in the prohibited action, are acting "under color" of law for purposes of the statute. To act "under color" of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents, quoting *United States v. Price*, 383 US, at 794, 16 L.Ed.2d 267, 86 S.Ct. 1152.

Fortunately, *Lugar* and even the parties take the position:

> . . . that that "something more" which would convert the private party into a state actor might vary with the circumstances of the case. This was simply a recognition that the Court has articulated a number of different factors or tests in different contexts: e.g., the "public function" test, *see Terry v. Adams*, 345 US 461, 97 L Ed 1152, 73 S Ct 809 (1953); *Marsh v. Alabama*, 326 US 501, 90 L Ed 265, 66 S Ct 276 (1946); the "state compulsion" test, *see Adickes v. S. H. Kress & Co.*, 298 US, at 170, 26 L Ed 2d 142, 90 S Ct 1598; the "nexus" test, *see Jackson v. Metropolitan Edison Co.* 419 US 345, 42 L Ed 2d 477, 95 S Ct 449 (1974); *Burton v.*

> *Wilmington Parking Authority*, 365 US 715, 6 L Ed 2d 45, 81 S Ct 856 (1961); and, in the case of prejudgment attachments, a "joint action test," *Flagg Brothers*, 436 US, at 157, 56 L Ed 2d 185, 98 S Ct 1729. Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here. *See Burton, supra*, at 722, 6 L Ed 2d 45, 81 S Ct 856 ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance") (73 L.Ed.2d 482 at 496 (1982).

Unfortunately, the litigants cannot agree on the interpretation of the cases touching upon the three tests aforesaid. As the *Lugar* Court has said that what might convert a private party into a state actor might vary with the circumstances of each case, so we will rely upon court of last resort precedent primarily and interpret that with the actions or facts in the case at bench.

As pointed out above there are four tests, three of which are applicable here, to aid us in resolving this conflict. Although not specifically so denominated, the Supreme Court utilized the public function test in *Marsh, supra*, which case is significantly different from the one presented to us in that it involved the distribution of religious literature on the streets of a privately owned town and in violation of a state penal statute, namely, "[trespass after warning]", (Title 14 § 426 of the 1940 Alabama Code). In the concluding words of the author of the opinion, "[i]nsofar as the State has attempted to impose criminal punishment on appellant for undertaking to distribute religious literature in a company town, its action cannot stand." Having no such statute involved herein *Marsh* is of little assistance. Even though the public function test was employed in *Smith v. Allwright*, 321 U.A. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1943) and *Terry v. Adams*, 345 U.S. 461, 79 S.Ct. 809, 97 L.Ed. 265

(1952), these cases involve the exclusion of a class from voting and in the words of Mr. Justice Frankfurter concurring in *Terry*, "[t]his is a case in which county election officials have participated in and condoned a continued effort effectively to exclude Negroes from voting." Thus we note that the public purpose is obvious. In *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477, (1974), involving the state's conference of a utility monopoly on a private company, the Court refused to extend the doctrine of what it termed a "limited line of cases" into a broad principle that all businesses "affected with the public interest" are state actors in all their actions. This "limited line of cases" was enumerated as *Terry, supra, Marsh, supra, Nixon v. Condon*, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 ALR 458 (1932) and *Evans v. Newton*, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966). *Jackson* was followed by *Rendell-Baker v. Kohn*, 457 U.S. 830, 102 S.Ct. 2764, 73 L.Ed.2d 418, and *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534, both decided June 25, 1982. These cases rejected the contention that receipt by a private entity of public funds converted that agency into one that is to be considered a state actor. In so doing, the Court in commenting on the public function test said in *Rendell-Baker* at 73 L.Ed.2d at 428:

> The third factor asserted to show that the school is a state actor is that it performs a "public function." However, our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been "traditionally the *exclusive* prerogative of the State." *Jackson, supra*, at 353, 42 L Ed 2d 477, 95 S Ct 449; quoted in *Blum v Yaretsky*, post, at 1011, 73 L Ed 2d 534, 102 S Ct 2777 (emphasis added). There can be no doubt that the education of maladjusted high school students is a public function, but that is only the beginning of the inquiry.

> Chapter 766 of the Massachusetts Acts of 1972 demonstrates that the State intends to provide services for such students at public expense. That legislative policy choice in no way makes these services the exclusive province of the State. Indeed, the Court of Appeals noted that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools. 641 F2d, at 26. That a private entity performs a function which serves the public does not make its acts state action.

Four years after *Rendell-Baker, NCAA v. Tarkanian*, 488 U.S. 179, 109 S.Ct. 545, 102 L.Ed.2d 454 (1988) was delivered wherein Mr. Justice Stevens, writing for the majority said (102 L.Ed.2d at 484):

> In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action. This may occur if the State creates the legal framework governing the conduct, e.g., *North Georgia Finishing, Inc. v. Di-Chem, Inc.* 419 US 601, 42 L Ed 2d 751, 95 S Ct 719 (1975); if it delegates its authority to the private actor, e.g., *West v. Adkins*, 487 US 42, 101 L Ed 2d 40, 108 S Ct 2250 (1988); or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior, e.g., *Burton v. Wilmington Parking Authority, supra.* Thus in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.

The most recent comment on our inquiry can be found in *Edmonson v. Leesville Concrete Co.*, 500 U.S. ——, 1211 S.Ct. ——, 114 L.Ed. 660 at 674 (1991):

> Our precedents establish that, in determining whether a particular action or course of conduct is governmental in character, it is relevant to examine the following: the extent to which the actor relies on governmental assistance and benefits, see *Tulsa Professional Collection Services, Inc. v. Pope*, 485 US 478, 99 L Ed 2d 565, 108 S Ct 1340 (1988); *Burton v. Wilmington Parking Authority*, 365 US 715, 6 L Ed 2d 45, 81 S Ct 856 (1961); whether the actor is performing a traditional governmental function, see *Terry v. Adams*, 345 US 461, 97 L Ed 1152, 73 S Ct 809 (1953); *Marsh v. Alabama*, 326 US 501, 90 L Ed 265, 66 S Ct 276 (1946); Cf. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 US 522, 544-545, 97 L Ed 2d 427, 107 S Ct 2971 (1987); and whether the injury caused is aggravated in a unique way by the incidents of governmental authority. see *Shelley v. Kraemer*, 334 US 1, 92 L Ed 1161, 68 S Ct 836, 3 ALR2d 441 (1948).

From all the foregoing we have observed that every case must be examined from the facts of each situation; that the receipt of state funds does not convert private actors to state actors; and that in the case at bench the government is not in the business of conducting festivals. Neither can it be said that there was any duty, legal or otherwise, for the city or county to promote or revitalize downtown Frankfort or, for that matter, any other area within their respective boundaries. Even if the contrary might have been true, then we are unable to say under *Rendell-Baker* that the private corporation would have become a state actor. CARTL has failed in establishing that DFI was performing a public function.

We now turn to the symbiotic relationship test relied upon in *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed 245 (1961), wherein the Authority, and through it, the State, made itself a party to the discriminate food service policy by electing, through a contractual relationship, to place its power, prestige

and property behind the admitted discrimination. However, the Court limited its views (6 L.Ed.2d at 52):

> Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

Jackson, at 42 L.Ed.2d at 488, succinctly analyzed *Burton* when it was pointed out:

> We also find absent in the instance case the symbiotic relationship presented in *Burton v. Wilmington Parking Authority*, 365 US 715, 6 L Ed 2d 45, 81 S Ct 856 (1961). There where a private lessee, who practiced racial discrimination, leased space for a restaurant from a state parking authority in a publicly owned building, the Court held that the State had so far insinuated itself into a position of interdependence with the restaurant that it was a joint participant in the enterprise. *Id.*, at 725, 6 L Ed 2d 45. We cautioned, however, that while "a multitude of relationships might appear to some to fall within the Amendment's embrace," differences in circumstances beget differences in law, limiting the actual holding to lessees of public property. *Id.*, at 726, 6 L Ed 2d 45.

In distinguishing *Rendell-Baker* from *Burton*, the Court found in the former that the school had entered into fiscal relationship with Massachusetts yet even that element did not create the symbiotic connection as one of three necessary elements to make it a state actor. In a sense the same is true for Metropolitan Edison in *Jackson*. In the matter before us there is no contractual arrangement and, except in the views of appellant, there cannot be said to be any monetary benefit extending to the city or county. Moreover, as we have pointed out above, we know of no

city authority which it has delegated to DFI. We find no alter ego.

We find not even the slightest suggestion of compulsion upon the part of any governmental agency to require DFI to perform any function or to dictate how it should perform any undertaking. In this respect we direct attention to the views expressed in *San Francisco Arts & Athletics, Inc. v. U.S.O.C.*, 483 U.S. 522, 107 S.Ct. 2971, 96 L.Ed.2d 427 (1987). If anyone connected with government in the case before us took part in any action affecting appellant it was favorable to CARTL's position.

The concept proferred to us that DFI was the creature of state statute and the veiled suggestion that this could make it a state actor is beyond cavil. Neither do we see the slightest merit in the argument that the city surrendered governmental control over St. Clair Mall by permitting appellees to use it for a festival on one day for seven hours.

We are not unaware of the many U.S. Court of Appeals decisions cited in briefs of counsel, but since they are not binding upon this tribunal we have elected to rely upon the many opinions of the United States Supreme Court in reaching our conclusions.

The judgment is affirmed.

EMBERTON, JUDGE, CONCURS.

HUDDLESTON, JUDGE, DISSENTS AND FILES A SEPARATE OPINION.

HUDDLESTON, JUDGE, DISSENTING. I reach the opposite conclusion from that reached by the majority on the state-action issue and I therefore respectfully dissent.

The purpose of DFI's festival is to promote downtown Frankfort. In fact, DFI exists to help bring about the revitalization of the downtown area. In order to accomplish its objective, DFI receives funding from the Ken-

tucky Heritage Council, a state organization; from the City of Frankfort; and from the Franklin County Fiscal Court. The festival itself takes place on city-owned property.

I concede that examined separately and in light of existing United States Supreme Court decisions these factors do not individually represent a significant degree of state action. However, as the Supreme court has stated, "the dispositive question in any state-action case is not whether any single fact or relationship presents a sufficient degree of state involvement, but rather whether the aggregate of all relevant factors compels a finding of state responsibility." *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722, 81 S.Ct. 856, 6 L.Ed.2d 45, 50 (1961). Upon weighing the circumstances of this case, I believe that the trial court erred in ruling that DFI is not a state actor.

In *Citizens To End Animal Suffering and Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F.Supp. 65 (D. Mass. (1990), a federal district court found that the Marketplace was a state actor. In that case, protestors representing appellant's organization were arrested by the Marketplace's security officers while handing out leaflets outside Faneuil Hall. Applying the same analysis as the majority in the case at hand, the court found that the Marketplace had assumed a traditional public function when it determined who could use the public lanes:

> By prohibiting protestors from assembling in the lanes, the Marketplace is deciding who can use the public easement, and under what circumstances they can use it. Rather than acting as a private contractor, therefore, the function performed by the Marketplace is more akin to that of a policeman. This, it seems, is a function that has traditionally been the exclusive domain of the state.
>
> Indeed, the power to decide who can use a public easement goes beyond even that of a policeman. Unlike the policeman who merely executes decisions

> of policy, defendant here is actually making those policy decisions. Defendant's role is thus more like that of a legislature, which is even more clearly an exclusive state function. *Id.* at 71.

The court also stressed that the premises qualified as a limited public forum. The court said that "the open lanes of the Marketplace are not unlike a public park which, as the Supreme Court held in *Evans v. Newton,* 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966), must be 'treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law.'" 745 F.Supp. at 71.

In analyzing state-action issues, the Supreme Court has placed great importance on whether the premises upon which controversial conduct occurs is public in character. In *Burton v. Wilmington Parking Authority, supra,* the Supreme Court determined that a private restaurant, located in a public parking garage, was a state actor when it discriminated against blacks. In reaching its conclusion, the Court stressed the fact that the restaurant leased land from the State and was located in a public facility "dedicated to public uses," and that the rent from the restaurant contributed to the support of the public facility. *Burton,* 365 U.S. at 723, 81 S.Ct. at 860, 6 L.Ed.2d at 51.

The *Burton* Court also concluded that the State benefitted economically from the restaurant's policy of racial discrimination because the State's financial well-being was directly influenced by the restaurant's profits. *Burton,* 365 U.S. at 724, 81 S.Ct. at 861, 6 L.Ed.2d at 51.

In *Citizens to End Animal Suffering, supra,* the federal district court similarly found that the city enjoyed an economic benefit from the Marketplace's endeavors:

> The City's primary purpose in leasing the property to defendant was to revitalize the downtown area. To this end, the City depends on the ability of the

> Marketplace to attract business to the area. Consequently, to the extent that the Marketplace fails to attract business, the City's goal of revitalizing the downtown area is frustrated. As in *Burton*, therefore, the city derives a direct economic benefit from defendant's policy of restricting plaintiff's access to the premises.

The present case involves many of these same factors. First, DFI's festival was held on St. Clair Mall in downtown Frankfort, an area clearly "dedicated to public uses." Furthermore, DFI undertakes an exclusively traditional public function when it makes quasi-legislative policy decisions as to who may or may not use the public mall. Finally, the City of Frankfort enjoys a direct economic benefit from DFI's restriction of controversial groups since it is in the City's best interest that the downtown flourish.

Consequently, I believe that the trial court erred in ruling that DFI is not a state actor. Accordingly, I would reverse the trial court's decision dismissing CARTL's complaint.

APPENDIX D

SUPREME COURT OF KENTUCKY

92-SC-347-D
(90-CA-2564)

CAPITAL AREA RIGHT TO LIFE, INC.,
Movant

v.

DOWNTOWN FRANKFORT, INC.,
JOHN GRAY, INDIVIDUALLY,
and JOHN GRAY, AS PRESIDENT
OF DOWNTOWN FRANKFORT, INC.,
Respondents

Franklin Circuit Court
No. 90-CI-1636

ORDER GRANTING DISCRETIONARY REVIEW

[Filed Nov. 11, 1992]

The motion for review of the decision of the Court of Appeals is granted.

Further briefing shall proceed in conformity with CR 76.12, the appellant's brief to be filed within thirty (30) days of the entry of this order.

ENTERED November 11, 1992.

/s/ Robert F. Stephens
Chief Justice

APPENDIX E

SUPREME COURT OF KENTUCKY

92-SC-347-DG

CAPITAL AREA RIGHT TO LIFE, INC.,
Appellant

v.

DOWNTOWN FRANKFORT, INC., and
JOHN GRAY, INDIVIDUALLY, AND AS PRESIDENT
OF DOWNTOWN FRANKFORT, INC.,
Appellees

On Review from Court of Appeals
90-CA-2564
Franklin Circuit Court
Hon. Squire N. Williams, Jr., Judge
90-CI-1636

ORDER DENYING PETITION FOR REHEARING AND MODIFICATION, MOTION TO STRIKE AND MOTION TO MODIFY AND GRANTING THE MOTION TO RESPOND

Appellant's petition for rehearing and modification is denied. Also, the motion to strike and the motion to modify is denied. The motion to respond is granted.

Stephens, C.J., and Leibson, Reynolds and Spain, JJ., concur. Combs, Lambert and Wintersheimer, JJ., would grant the petition for rehearing.

ENTERED: October 28, 1993.

/s/ Robert F. Stephens
Chief Justice

No. 93-1201

In The

Supreme Court of the United States

October Term, 1993

CAPITAL AREA RIGHT TO LIFE, INC.,

Petitioner,

v.

DOWNTOWN FRANKFORT, INC. and JOHN GRAY, individually and as President of Downtown Frankfort, Inc.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Kentucky

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

For reasons stated in the Cross-Petition for Writ of Certiorari to the Supreme Court of Kentucky, the respondents respectfully request the Court to grant the Writ of Certiorari on the issue of whether the Kentucky Supreme Court correctly determined that the respondents were acting under color of state law for purposes of 42 U.S.C. § 1983, when the respondents denied the petitioner's

request to participate in a pumpkin festival testimony sponsored by the respondents.

Respectfully submitted,

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Attorney for Respondents

SUPREME COURT OF THE UNITED STATES

CAPITAL AREA RIGHT TO LIFE, INC. *v.* DOWNTOWN FRANKFORT, INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 93-1201. Decided May 31, 1994.

The petition for a writ of certiorari is denied.

JUSTICE O'CONNOR, dissenting.

Each year, Downtown Frankfort, Inc. (DFI), a nonprofit corporation established to promote downtown revitalization in Frankfort, Kentucky, organizes a one-day "Great Pumpkin Festival" on the city's St. Clair Mall. Capital Area Right to Life, Inc. (CARTL) had a booth at the 1989 festival, where it, among other things, distributed plastic models of fetuses in little baskets. When many festival-goers objected to this sort of political advocacy at the Festival, DFI adopted a policy of denying booths to organizations that it deemed incompatible with the Festival's goals of "fun and entertainment." Under this policy, DFI refused to give CARTL a booth at the 1990 festival; DFI's president explicitly told CARTL representatives that this was because CARTL was a "controversial group." DFI also denied booths to Kentucky NOW and the Kentucky Religious Coalition for Abortion Rights, two political groups with a message opposed to that of CARTL. 862 S. W. 2d 297, 297–298 (Ky. 1993).

CARTL sued, claiming the policy violated its free speech rights. The Kentucky Supreme Court disagreed. It concluded DFI was a state actor, and thus subject to the strictures of the First Amendment, because (1) DFI

is principally funded by state agencies, (2) DFI took over from the city the function of promoting downtown revitalization, and (3) the city temporarily delegated to DFI control over the St. Clair Mall by letting DFI conduct the Festival and decide who gets booths. *Id.*, at 299–300. But the court went on to hold that the Festival's policy was nonetheless "content-neutral," and therefore a valid time, place, and manner restriction. *Id.*, at 300–301. The court interpreted the content-neutrality requirement as meaning that the restriction must be "neutral as to the type of message the restriction permits as well as being nondiscriminatory between messages of the same type, so long as there is a logical and legitimate reason for restricting the type of message." *Id.*, at 301. "It is a critical fact in this case," the court said, "that CARTL's counterparts, NOW and the Religious Coalition for Abortion Rights, were also denied booths in keeping with the festival's theme." *Ibid.*

This content-neutrality analysis is flatly inconsistent with our precedents. The restriction here is clearly not content-neutral, and therefore cannot be a permissible time, place, and manner restriction, because it is indisputably justified with reference to the controversial content of the speech. See, *e.g.*, *Boos* v. *Barry*, 485 U. S. 312, 321 (1988). The fact that pro-choice speakers were treated similarly under this regulation does not dispose of the content-neutrality analysis; we have time and again rejected the argument that viewpoint-neutrality equals content-neutrality. See, *e.g.*, *Burson* v. *Freeman*, ___ U. S. ___, ___ [112 S. Ct. 1846, 1850] (1992); *Boos*, *supra*, at 319; *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U. S. 221, 230 (1987); *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U. S. 530, 537–538 (1980); *Carey* v. *Brown*, 447 U. S. 455, 462, n. 6 (1980).

In fact, *Heffron* v. *Int'l Soc. for Krishna Consciousness*, 452 U. S. 640 (1981), the case on which the opinion below relied, specifically said that, to be a valid time, place, and manner restriction, a regulation "may not be based upon either the content *or subject matter* of speech," *id.*, at 648 (emphasis added). Perhaps there is some other reason why the restriction might be permissible; but to call it content-neutral and to uphold it on that basis is a serious error and an unfortunate precedent.

I also think the Kentucky Supreme Court's state action analysis raises an important and difficult question. Many private organizations—artists' groups, private hospitals, private universities, organizations that educate the public on social matters, presidential campaigns—get government subsidies. We have made clear that a state subsidy of a private organization, even a private organization that exercises functions which might otherwise be performed by the state, does not make that organization a state actor for First Amendment purposes. *Rendell-Baker* v. *Kohn*, 457 U. S. 830, 840–843 (1982) (dealing with a First Amendment claim based on the discharge of an employee by a private school for maladjusted high school students). That this case also involves the use of a traditional public forum probably should not change the analysis. Many of the groups mentioned above may put on events in public fora, and it is not clear that they should have any less right to exclude people from their events than any other public forum user would have to exclude others from its rally or parade.

We have recently granted certiorari in *Lebron* v. *National Railroad Passenger Corp.*, No. 93–1525, to resolve a related state action question. While we cannot now tell to what extent the decision in *Lebron* may bear on this case, I would hold this case pending that decision, and then either grant and remand in light of *Lebron*, or, if *Lebron* proves irrelevant, grant and summarily reverse on the content-neutrality point. Accordingly, I respectfully dissent from the denial of the petition for a writ of certiorari.